it was absolutely unsafe to do so, if not extremely dangerous. In the face of the authorities I find myself unable to allow my sympathies with the plaintiffs on their bereavement and their consequential loss of a bread-winner to decide, following *Lang's* case, that the possibility of danger was so apparent as to necessitate a finding of even a slight degree of negligence on the part of the defendant. In *Lang's* case the accident took place in broad daylight. Moreover, there was only a *"Slow"* sign at the junction and not a *"Halt"* sign. Further the bus driver saw some traffic to his left and the sudden appearance of the motor cyclist was not entirely unexpected.

There was nothing before me to show that the defendant had not had an unblemished career as a lorry driver hitherto. He has been driving along that route for more than 10 years. If I were to find some degree of negligence on the defendant's part in this case on the evidence adduced, I would be driven to a situation where I should have to find almost every defendant guilty of some negligence whether or not he was, in fact, negligent just because somebody had been injured or killed in a collision. I therefore regret that the plaintiff's claim must be dismissed with costs.

*Claim dismissed.*

Solicitors: *N.A. Christopher; Abishega-Naden & Co.*

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## PUBLIC PROSECUTOR v. LIM SWEE GUAN

**[A.Cr.J. (Ong Hock Sim J.) January 4, 1969]**
**[Penang — Criminal Appeals Nos. 18 and 19 of 1968]**

*Criminal Law and Procedure — Trial — Sentence — Adequacy of — Criminal Procedure Code (Cap. 21), ss. 302 and 310.*

*Penal Code, s. 408 — Criminal breach of trust by servant — Bank cashier — Principles in assessment of sentences.*

In this case the deputy public prosecutor appealed against the sentence imposed on the respondent. The respondent pleaded guilty to criminal breaches of trust of moneys belonging to a bank, of which he was the chief cashier. The total amount involved was $165,000. The president of the sessions court sentenced him to one year's imprisonment on each of the three charges. The sentences to run concurrently.

**Held,** allowing the appeal: in the circumstances the sentences were inadequate and should be enhanced to 1½ years on each charge, the sentences to run consecutively, a total of 4½ years.

*Cases referred to:—*

(1) *R.* v. *Ball* (1951), 35 Cr.App. R. 164.

(2) *R.* v. *Tuttle* (1929), 21 Cr.App. R. 85, 92. 93.

(3) *R.* v. *Mason & R.* v. *Soper* (1908), 1 Cr.App. R. 73.

(4) *R.* v. *Coleman* (1967), 51 Cr.App. R. 244.

MAGISTRATE'S CRIMINAL APPEAL.

*Haji Suhaimi bin Dato' Haji Kamaruddin* (Deputy Public Prosecutor) for the appellant.

*Triptipal Singh* for the respondent.

**Ong Hock Sim J.** (delivering oral judgment): These two appeals by the learned deputy public prosecutor are against the sentences passed by the learned president, Sessions Court, Penang, on the respondent who was charged in two cases upon the following:—

*Case No. Pg. 112/68*

(1) That you on 18.11.67 at the United Malayan Banking Corporation Ltd., Beach Street, Penang, in the District of George Town, in the State of Penang, being a servant in the employment of the said United Malayan Banking Corporation Ltd., and in such manner entrusted with certain property, to wit, cash $20,000 committed criminal breach of trust in respect of that property and thereby committed an offence punishable under section 408 of the Penal Code.

(2) That you on 20.11.67 at the United Malayan Banking Corporation Ltd., Beach Street, Penang, in the District of George Town, in the State of Penang, being a servant in the employment of the said United Malayan Banking Corporation Ltd., and in such manner entrusted with certain property, to wit, cash $41,000 committed criminal breach of trust in respect of that property and thereby committed an offence punishable under section 408 of the Penal Code.

*Case No. Pg. 116/68*

(1) That you between 10.11.66 and 13.10.67 at the United Malayan Banking Corporation Ltd., Beach Street, Penang, in the District of George Town, in the State of Penang, being a servant in the employment of the said United Malayan Banking Corporation Ltd., and in such manner entrusted with certain property, to wit, cash $104,000 committed criminal breach of trust in respect of that property and thereby committed an offence punishable under section 408 of the Penal Code.

The respondent pleaded guilty to the charges in both cases and was duly convicted and sentenced in case Pg. 112/68 to one year's imprisonment on the first charge and also to one year's imprisonment on the second charge, the sentences to run concurrently and in case Pg. 116/68 to one year's imprisonment to run concurrently with the sentences passed in case Pg. 112/68.

The principles which govern appeals against sentence are too familiar but could bear repeating and I therefore quote the words of Hilbery J. in the case of *R.* v. *Ball*:—(1)

"It appears to us appropriate that we should restate the principles which must guide a court in deciding what is the right sentence to pass on a prisoner. In the first place, this court does not alter a sentence which is the subject of an appeal merely because the members of the court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles, then this court will intervene.

In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe."

Section 310 of the Criminal Procedure Code (Cap. 21) reads:—

"At the hearing of the appeal the court may, if it considers there is no sufficient ground for interfering, dismiss the appeal or may —

(c) in an appeal as to sentence, reduce or enhance the sentence, or alter the nature of the sentence;"

The grounds of appeal were based on the failure of the learned president to have regard to the public interest and the seriousness of the offence and it is contended also that the sentences of one year to run concurrently is inappropriate. In the words of section 302 of the Criminal Procedure Code (Cap. 21) as amended by section 2 of Ordinance 40 of 1950 the last ground should allege "on the ground of the inadequacy of the sentence."

I allowed application by the learned deputy public prosecutor to consolidate the two appeals as they are common in that the offences were committed by the respondent while in his capacity of chief cashier to the United Malayan Banking Corporation Ltd. and were of a like nature.

The facts are not in dispute that the respondent as such employee had misappropriated in the first case sums totalling $61,000 on two dates namely 18th November, 1967 and 20th November, 1967 and in the second case of $104,000 between 10th November, 1966 to 13th October, 1967. I do not propose to go into detail with the duties of the respondent as such chief cashier which in the words of the learned president "is too simple it would seem that anyone could have done the offence if given a chance." On the facts as presented, the respondent was responsible for all money in the strong room and in addition to paying out cash to customers, was responsible for collecting cash from three sub-branches in Penang. It is also clear that but for the devaluation of the sterling, the respondent could have carried on blissfully his defalcations of the said Bank.

In mitigation, it was pleaded that accused was a first offender with a wife, two children and an aged ailing mother. He had been prior to his employment by the United Malayan Banking Corporation Ltd. employed by the Bank of China for 14 years. This would indicate that the respondent was not one who had not been conscious of the responsibilities associated with banking. It was stated that the accused had merely been the dupe of a prominent Chinese merchant who had used him for his own ends because he (the Chinese merchant) had been aware accused had access to money in the bank. It was stated "out of personal relationship, accused decided to take the money out and give to the mastermind because he thought money was only for 2 or 3 days". This occasion was supposed to relate to the sum of $20,000. This few days turned out to be few weeks. He was then persuaded to take out another $20,000. Then the amount totalled $165,000. These were the facts admitted by the respondent in case Pg. 141/67 which were also admitted in cases Pg. 112/68 and 116/68.

The duty of this court is also to decide whether in passing sentences the learned president had acted upon the correct principles. The authorities are clear. The respondent was the chief cashier of a bank. He held a position of trust.

I refer to the case of *R.* v. *Tuttle* [2] and the judgment of Justice Avory reported in 21 Cr. App.R. and quote a passage from pages 92 to 93:—

"The appellant was a clerk to a firm of solicitors, and it was in that capacity that he became entrusted with this money; and it is now well known that in cases of this description where a solicitor or solcitor's clerk is convicted of misappropriating trust money, a sentence of penal servitude almost invariably follows the conviction of such offence. Such sentence has been recognised as being appropriate because of the trust which is reposed in solicitors and their clerks, and the opportunity which is afforded them of being dishonest if they are so minded. In this case the appellant succeeded, as I have said, in keeping the widow in the dark for years — for at least nine years — about what had become of this money and how it had been invested, and she has been deprived, by his fraudulent conduct, of the bulk of that estate. Therefore, we feel no doubt that a sentence of penal servitude was an appropriate sentence. But our attention having been called to the fact that the appellant has already suffered some imprisonment in consequence of his inability to refund this money, and in view of a previous character which apparently was without blemish until this affair, we have come to the conclusion that some slight reduction in the sentence which was passed should be made. It is not usual in this court to interfere with sentences unless there has been some error in principle, or the sentence appears to be out of all proportion to the offence; . . . ."

I also refer to the case of *R.* v. *Mason* [3] and *R.* v. *Soper,* [3] and the case of *R.* v. *Coleman.* [4]

I have quoted the relevant cases which to my mind indicate the principles that should

guide the learned president in the assessment of the sentences.

As learned counsel for the respondent has indicated there is no yardstick to sentences and in such a case, the court is left with its discretion. The law only prescribed the maximum sentence within which the court is to act.

A couple of days before his arrest, a surprise check of the cash was carried out on 20th November, 1967 by Mohamed Zen, the sub-manager, assisted by Toh Yong Siah, another sub-manager. This check was due to devaluation of the sterling. As it was business hours, the accused in the capacity of chief cashier was observed going into the strong room and was seen to take out two or three bundles of $10 notes totalling approximately $20,000 or $30,000 and replacing them with slips of paper showing the amount he had taken out. The checkers assuming that the figures on these slips of paper represented cash found the cash holding correct. Due to irregular behaviour of the respondent a second check was carried out on the same day at 5.30 p.m. Cash shortage of $104,000 was discovered. The pieces of paper that had been placed there in the morning were no longer there. Further checking revealed that 2 other sums of cash being deposits from customers that had been handed over to the respondent on 18th November, 1967 and 20th November, 1967 and acknowledged by him were found missing.

The question of this being the first offence ought not to enter into a consideration of sentence. This is not the type of offence that the respondent would be allowed to commit over and over again. There is no evidence, there is only the respondent's word that he was a dupe of the mastermind but he has to be super dupe to be duped to the extent of $165,000 over a period from 1966 to 1967. There can be no justification and there can be no excuse for being charitable as counsel has put it and using the bank's money for his friend. On 20th November, 1967 he took out further sums, substituted them with slips of paper and later removed these slips. I cannot see in this any repentant attitude. There is no mitigating factor and no evidence which went to show that the respondent was in desperate circumstances at the time and was tempted to use the money. He had misappropriated a considerable sum of other people's money. We only have his word that he was taken for a ride by this mastermind but it is equally conceivable that he had salted the money away somewhere or had entered into a partnership with the mastermind in the import and export business.

I therefore consider the sentences passed by the learned president as wholly inadequate. I sentence him in the first case Pg. 112/68 to a term of 1½ years on the first charge, 1½ years on the second charge to run consecutively. In case Pg. 116/68, I vary the sentence of 1 year to a similar one of 1½ years to run consecutively to the sentences in case Pg. 112/68. That will be a total of 4½ years imprisonment. It is necessary when banks are springing up at every street corner to ensure that bank employees should have some regard for their duties and responsibilities.

*Sentences enhanced.*